

MAINE STATE HARNESS RACING COMMISSION
MINUTES OF MEETING
May 9, 2018

Burton Cross Office Building, Room 208
Capital Street, Augusta, Maine
Starting Time 9:00 a.m.

Commission Members Present: Michael Timmons, Chair, Gary Reed, William McFarland, William Varney, and Michael Graham

Commission Members Absent: None

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier, Miles Greenleaf, Betty Farr, Jaime Wood, and Zachary Matzkin

1. Call the Meeting to Order and Introductions: Michael Timmons, Chair

2. Review and Approval of Minutes
None.

Review and Approval of Decision and Orders
None.

3. Adjudicatory Hearings Continued:

AAG, Guay met with Commissioners Timmons, McFarland and Reed prior to the hearing. He stated that they had a discussion on how they would proceed in this matter. He stated that the Commission is going to entertain a vote to appoint Commissioner McFarland as chair for the remaining of the proceeding. Commissioner Reed made a motion for the pending matter Commissioner McFarland serve as chair. Commission Timmons seconded. Vote 3-0. AAG, Guay stated that at this time, they have two recusals and Commissioners Timmons and Reed¹ are recusing themselves. They had a prehearing conference and there was a pending motion which as a result of the recusal it no longer needs to be heard. He is also not going to take up into evidence the proposed exhibits, and he would like to also exclude the documents that have been admitted under seal because they are no longer relevant to the proceeding. He doesn't see how his understanding was, they were admitted for the recusal of one of the Commissioners so he is not sure why they would remain on the record at this point, unless there is an objection. There was no objection so the documents under seal will be expunged from the record.

After testimony was provided, AAG, Guay closed this portion of the hearing to go into deliberations. He stated to Commissioner McFarland for the purposes of a record he would like to ask him specific questions in terms of findings of fact. If you do find a violation, and if you proceed forward with a remedy that, and there is an appeal then it would be helpful if the court had before it facts that you found rather than we trying to parse out what your thinking was by the record. With that he doesn't think he needs to go over what the stipulated facts are, do you recall what they were? Commissioner McFarland stated yes, he does. AAG, Guay asked if whether or not there was the presence of betamethasone in the horse and you would do it for each trainer Ms. Gibbs and Ms.

¹ Commissioner Reed would like to have the following clarification reflected in the minutes: "I did not voluntarily recuse myself. I could not vote because I was never provided with the recording of the second portion of the hearing as was promised. When I asked Mr. Jennings why I did not receive that recording, he responded that he had been directed by counsel not to make it available to me. Very troubling!"

Grondin on the race date whether there is sufficient evidence on the record to indicate that there was a presence of betamethasone in excess of the threshold in the rule. Do you have a finding as to whether or not there was in the matter of Gibbs that there was the presence of betamethasone higher than the threshold level? Commissioner McFarland stated yes there is as exhibited in exhibit 11 and exhibit 9. He stated that 9 refers to Gibbs from LGC report of 55 pgs and the split sample from Texas A&M exhibit 11 confirmed the 54. AAG, Guay asked in terms of Grondin how do you find on that question. Commissioner McFarland stated that he found the same that there was a positive over and above the 10 pcs in the amount of 26 from the LGC report and the split sample from Texas A&M confirmed the 28.4. Those are exhibits 7 and 9 respectively. AAG, Guay asked if whether or not he finds betamethasone is a permitted medication under the Harness Racing Commission rules. Commissioner McFarland stated that it is permitted. AAG, Guay asked if he was relying on the plain text of the rules or the permitted medication schedule that has been incorporated into the rules. Commissioner McFarland stated yes. AAG, Guay stated that this one would be helpful if you can make a finding or if you don't feel you can make a finding that's ok as well. Based on the evidence that you heard over the last several days in particular in terms of the fact witnesses, do you find any evidence of a knowing or intentional administration of betamethasone for the purposes of effecting the race, the performance of the race. Or alternatively can you make a finding of whether the evidence indicates that the betamethasone was administered for the purposes of therapeutic purposes. Commissioner McFarland stated he believes based on all the testimony that it was administered for the purpose of therapeutic help of the animal. AAG, Guay asked if he finds any evidence that betamethasone had been administered for the purposes other than therapeutic treatment/condition of the horses. Commissioner McFarland stated no he does not. AAG, Guay stated that those are the important factual findings to put in the decision and order. Based on those factual findings do you have any questions or thoughts? Commissioner McFarland stated that in his lifetime he has taken an oath three different times, a major oath to support the rules and regulations for the Federal Government, State Government and for the Maine State Harness Racing Commission. During his 37 years at DOT, he had to follow a whole bunch of rules, and also he wanted to commend everyone here today and the last meeting for their testimony and the evidence that each of you presented; however, he has to make a recommendation that he finds comes difficult but being a follower of the rules he has to say that taking into consideration all the testimony and all of the evidence that a violation has occurred with respect to Maine Harness Racing Commission rules as they currently are written. AAG, Guay asked if that is the case for both Gibbs and Grondin. Commissioner McFarland stated that is the case for both parties, yes. AAG, Guay asked specifically do you find a violation of the therapeutic medication rules. Commissioner McFarland stated that he does. AAG, Guay stated that would conclude this portion of the hearing and now we move on to the remedy. In this case the state goes first. For the record, he asked parties to be prepared to answer a question regarding the availability of a purse return that was based on the testimony by the executive director that the purse return is being sought. At this point he thinks that we don't necessarily need to get that question, he would ask at this point if there has been a change in recommendation or what is the recommendation in terms of the penalty for each of these individuals. AAG, Randlett stated he has no witnesses Mr. Jennings has already testified with respect to what they were asking for. Their recommendation with regard to a penalty there's been no change in that. They take no position otherwise on this issue, it's up to the Commissioner to decide what would be an appropriate remedy under the rule based on the information he's heard. The only thing he would say is that it is important for the Commission to be consistent with its actions in prior similar cases with regard to the position of penalties. AAG, Guay asked if the state has a position on the interplay between Title 8 Section 279-A and Section 280 and the availability of purse returns. AAG, Randlett stated that he can address that. The rule provides as an option for purse returns. That statute creates a mandatory penalty of purse return for certain types of violations. It does make reference to. Section 280, Subsection 3.B says that the owner of any horse

that has found to be stimulated or doped must be denied any part of the purse. There is obviously no evidence here that has been any kind of stimulation in a sense that it is talking about here. Doped he doesn't know how old the statute is. The point is that this is a mandatory penalty doesn't necessarily control or apply. There is nothing in the statute that he would argue that would prevent the Commission from adopting its own rule that provides for discretionary penalties to involve a certain penalty including the loss of purse or other types of violations which is what your rule does. He has pointed out in his closing argument Chapter 21 penalties are not mandatory they are discretionary. He doesn't think this necessarily is controlling. AAG, Guay stated that when the Commissioner considers whether or not to apply the purse return, he understands that it is discretionary it is not required under the rule, and the Commissioner is looking at the statute and 280 specifically says except as provided in Section 279-A. What is the meaning of that clause. AAG, Randlett stated that he has no idea. He looked at the statute and the difference he sees the legal distinction he sees here is, that is a mandatory penalty and he doesn't think that statute is controlling. AAG, Guay asked just to be clear, you don't think section 280 is controlling. AAG, Randlett stated he does not. AAG, Guay asked which of the respondents would like to go first. Attorney Steigleman stated that the evidence that was put in during the liability phase is still of record. AAG, Guay stated yes, it is. Attorney Steigleman stated as to hearing officer's question about the interplay of section 279-A and 280 he takes the states comment that 280 doesn't apply. He thinks the Chair's decision that it was all for therapeutic there's no intentional violation. It seems to him that gets them out of section 280, the argument in 280 says a person may not intentionally or knowingly; and it goes on to say all the stuff you can't do. He believes the Chair's ruling that there was no intentionality or knowing violation so he thinks they are out of the mandatory purse return as described in section 280 so that puts us back into cross reference to 279-A he doesn't think matters. More importantly, 279-B talks about the rules that the Commission may adopt for penalties and the Commission is authorized to levy a fine after noticing hearing for each violation of the rules. A fine is a payment of a dollar amount after a finding of liability. It seems to him that a purse return is one thing and a fine is something else and the Legislature used those terms differently to mean different things; and he doesn't understand there to be a basis in the statute to mush those two concepts together and say a fine is the same thing as a purse return because a purse is money. There is no basis for that. So it seems to him that a rule that purports to incorporate something your allowed to do in the statutes that we're going to make this discretionary because we want to do it other times too; he doesn't think that's authorized when fines are authorized in section 279-B, but he looks at 279-B and it says nothing about purse returns and when they are required they tell you because in section 280 they tell you you've got to do it. So, it seems to him that a purse return is not in the cards by statute. And to the extent that the Commission thinks it still has it under their rule. The chair heard all the discussion from the respondents and he believes their incredible testimony they did everything right. The chair found a violation they did everything right despite that. He would suggest that the correct result from where we are right now without waiving any arguments they may have on an appeal but from here maybe the best result is a finding of no violation in light of the incredible witnesses coming forward saying they did everything right. Witness after witness saying there is nothing else they could have done except to under treat the horse which then would have curtailed the horses racing career. He would suggest the chair imposing no penalty or a warning as discussed in some of the licensed owner regulations in Chapter 17. AAG, Guay stated to Mr. Childs it was his turn. Attorney Childs stated that they are talking here about the application of the trainer responsibility rule under which the trainer is deemed to be strictly liable for this occurrence, and then what should be the punishment for the trainer. Mr. Jennings previously indicated through Ms. Gibbs he was recommending a \$500 fine or \$400. Then we turn to the application as to what to do about the purse. In the situation of the Gibbs matter, she is not the owner of the horse of record. Ron Cushing is a third owner presumably and then there are two other owners as well, Lucia Les and Mr. Clairmont who is deceased. So, applying the trainer

responsibility rule to the owner and coming up with an owner responsibility rule under the facts and circumstances of this case seems to him to be inappropriate. The owners clearly did not do anything here. Two of the three owners in the Gibbs matter weren't even present when the decision was made to inject the horse utilizing the guidelines that were in place; nevertheless, we're thinking about punishing the owners who were not present who were not actively involved in the decision and taking from them in both cases very large purses. That seems to him to be very disproportional. In the law, we like to think that when people are being punished that it be in proportion to what they did wrong. To him it seems to be excessive to punish the owners of Heidi Gibbs horse that she trained to the tune of \$5,000 for 55 trillionths of a gram of betamethasone in a blood test that was done of the horse; that just seems to him to be disproportional, and he thinks it is an unfair application of the trainer responsibility rule to the owners in this case. AAG, Guay stated that they would move to deliberations. He thinks what he heard from the parties is, that the applicable rule section is contained in Chapter 17 on page 9 and that's the Class C penalty. The following are recommended penalties for violations due to the presences of a drug carrying a Class C penalty. The first thing he would note is that they are recommended penalties and they are not mandatory penalties, so you have more discretion in regards to the penalty. He heard counsel argue that while you can find no violation, you have already ruled in the section of the hearing immediately prior to this section that there was a violation. There is a violation, so now you need to look at page 9 and decide what the penalty should be. These are guidelines. It doesn't say you have to. If they said you had to then you would be in the position where his advice to him would be that you cannot ignore your rule, but fortunately you're not in that position. You have a series of guidelines here. The right-hand column of the Class C penalty schedule would be the appropriate penalty because although it has not been specifically argued in the exhibits if you parse through the ARCI guidelines that have been adopted you will find that betamethasone is a Class 4 substance. Additionally, that it would carry a Class C penalty, so that is why you are in this column. When you're looking at the rule, there is a distinction here during our proceedings however you will see that one section of the column is for licensed trainer and the other one is for licensed owner. You in fact are penalizing different people. The other thing is that the recommended guideline says loss of purse for Class C violations. You have discretion but he would suggest to Commissioner McFarland that he may want to look at the statute to determine whether or not because not all Class C compounds. There is a further distinction, if you look at the ARCI guidelines, the ARCI guidelines have published a list of permitted medications and some of those permitted medications have Class C penalties associated with them. In addition, they are prohibited substances which is a greater set of substances, so where there are maybe 24 permitted medications there are literally thousands of prohibited substances; and the distinction is those are not therapeutic and those have Class C violations. So, when you're looking at your rule where it says loss of purse and it's under Class C violations, he thinks the additional analysis that needs to occur is whether or not the fact that the violation is of a permitted medication, and whether that would have a legal importance as far as the statute. That is his advice as to the factors and how you would go about analyzing it. Commissioner McFarland made a finding that the trainer of "Lets Get It all" Heidi Gibbs was found to be in violation and the penalty that would be appropriate he believes would be a first offense, and it calls for a minimum penalty of \$500 by our current rules and loss of purse for the owner. He would assess the first offense for Heidi Gibbs that's a minimum penalty of \$500 and he would assess a fine of \$1,000 and no loss of purse. AAG, Guay asked as to the \$1,000 it's because it's minimum. We don't have mitigation in the penalties anymore so you don't need to make a finding on the presence of mitigation factors. In terms of the owners and no loss of purse, is that based on a legal finding in your mind. Commissioner McFarland stated that it's based on the fact that the testimony of the owners did not have any knowledge of the medications being administered in that respect, and that it does ultimately go back to trainer responsibility according to our rules. AAG, Guay stated that he wants to be clear because this may set precedence for other cases. So, for

owners are you saying that there has to be a showing that the owners knew of the action in order to be subject to a purse return. Are you talking about the knowing and intentional of section 280? Commissioner McFarland stated that all the testimony that occurred during the process clearly indicated that the owners had no knowledge and relied on their trainers and their vets to administer the appropriate medication at the appropriate levels. AAG, Guay asked so in that, is it an important distinction to you compared to other cases that this was a therapeutic medication then. Commissioner McFarland stated yes it was a therapeutic medication. AAG, Guay asked if that was important in his analysis. Commissioner McFarland stated yes. AAG, Guay asked, if this was the presence of a substance that was not a therapeutic medication, would you have a different view as to the purse return. Commissioner McFarland stated absolutely. AAG, Guay asked so in your mind, the distinction is because it was a therapeutic medication. Commissioner McFarland stated based on the testimony that was provided during the two days of the hearing. AAG, Guay asked about Ms. Grondin's. Commissioner McFarland stated that he would like to ask the executive director if this is the second violation within the prescribed time of 365 days. Mr. Jennings stated second. AAG, Guay stated that Ms. Grondin did testify to that fact but he doesn't recall the date. So, there is evidence on the record. Commissioner McFarland asked is there other evidence he knows in previous hearings they've been told that they can consider other jurisdictions violations. AAG, Guay stated that he can reopen the proceeding to take additional testimony from a department witness if you wish. Commissioner McFarland stated that wasn't necessary. AAG, Guay asked if the parties could stipulate to the date of the consent agreement. Attorney Steigleman stated August 7, 2017. AAG, Guay asked if it was a Class C violation. Both parties stated yes. Commissioner McFarland stated that the chair's recommendation in the case of Valerie Grondin complaint number MSHRC 45 has been determined that a violation has occurred and it is a second offense as in their schedule which requires a minimum penalty of \$1,000 and 15-day suspension. He would levy a \$2,500 fine with the 15-day suspension included and as far as the owner no loss of purse. AAG, Guay repeated what he had in the matter of Gibbs he would levy a \$1,000 fine for a first offense and as to the owner penalty that there would not be a return of purse based on the fact that it was a therapeutic medication violation and in the matter of Grondin you find a second offense and you would levy a \$2,500 fine and impose a 15 day suspension and also in the matter of Grondin for the owners of Grondin that there would not be a loss of purse and is that for the same reason because it was therapeutic medication. Commissioner McFarland stated yes, it is. AAG, Guay stated formerly just to be absolutely strict with the rules of procedure this is going to sound silly but he thinks he would move the question, so you would move it yourself and vote it. Commissioner McFarland moved the question and vote in the affirmative in reference to the two penalties and fines that have been suggested. AAG, Guay closed this part of the hearing. He described to the parties what happens. He will reduce this decision to writing and it will be voted on the next meeting by Commissioner McFarland. At that point in time it will be considered final agency action. Any filing of an appeal at this point will be premature. He will note however what they have allowed is if the parties wish to make a motion for a stay that they will allow that prior to final agency action. If the parties do appeal, it will also allow for a filing of a stay and as parties know the precondition for a stay to be considered by Superior Court is that the agency would deny a motion at the agency level. He would entertain a motion at this point for a stay if a party wishes to make that. Attorney Steigelman stated he would like to move for a stay. AAG, Guay asked if that was in regards to Grondin. Attorney Steigelman stated yes. The basis is primarily with no loss of purse being accessed and the funds still be held he doesn't want there being an issue with the distribution of funds when there's no loss of purse coming. If the entity holding onto the funds are directed there is a stay in place and everybody hold what you've got, then either after the appeal period runs or after a full court of appeals then the entity holding the money will continue to hold the money and we won't have a problem of money disappearing despite no loss of purse being ordered. AAG, Guay stated he doesn't think the purse is going to be redistributed because there was a finding of no purse.

Attorney Steigleman stated that's why he is moving for a stay to make double sure the money doesn't go anywhere specially if it isn't going to be redistributed. AAG, Guay asked as to the suspension and the fine, is there a motion for stay in terms of that. Attorney Steigleman stated he would like to stay that as well. AAG, Guay stated to the department that doesn't the department typically take an active role in collecting the purse and redistributing it. Mr. Jennings stated normally but not in a Sire Stakes final. In a Sire Stakes final, all of the purses are held pending the results of the laboratory test. AAG, Guay stated just to be clear nothing happened to the purse pending the finality of an appeal which in this case you aren't being ordered by Commissioner McFarland to redistribute the purse anyway. Attorney Childs stated that neither of them are asking for a stay. AAG, Guay stated that what you want to ensure is that the purse not be given to anybody other than Mr. Varney. The department may appeal and therefore the purse would be disgorged. He would suggest to all parties the best course is to have the purse remain where it is until the written final decision and order is tendered, and then if there's an appeal then the purse perhaps remains to be held and if the department doesn't file an appeal for example. AAG, Randlett stated that there is no intension on the part of the department to distribute that money pending the final decision on this matter and as a matter of legality he is not sure what would be stayed because there is no order. AAG, Guay stated that in this case had there been an order of a purse return. AAG, Randlett stated that in the event of an appeal by the department we're not going to take action to distribute a purse based on a matter that's under appeal. AAG, Guay stated with that assurance both parties are withdrawing their motion for a stay is that correct. Attorney Steigleman stated yes provided once the order comes signed out by the Commission at that point we talk to the department and the racetrack about distributing funds. AAG, Guay stated that you can talk to them but nothing occurs until the decision is signed and adopted in written form. Attorney Steigleman stated that they are not asking for a stay at this time nor a fine. AAG, Guay stated that all we can do is act on a motion. So, you're not making a motion for a stay. It is understood that there will be some disposition of the purse after the final order is adopted because there is still an appeal period and any of the parties here can file an appeal and depending on the action of the parties that could determine what will happen in the interim with the purse. If the fine and the suspension is not an issue, then we will not need to have a stay at this point. He closed the hearing.

The transcript of the hearing regarding Heidi Gibbs complaint number 2017 MSHRC 29 and Valerie Grondin complaint number 2017 MSHRC 45 is available at the Maine State Harness Racing Commission office.

- a. **RE: Heidi Gibbs, Complaint Number 2017 MSHRC 29.** Ms. Gibbs is alleged to have violated MSHRC Rules Chapter 7 and 11. Ms. Gibbs is the trainer of record for the horse "Lets Get It All". A blood sample obtained from Lets Get It All following the First Non-Betting Race at the Skowhegan Fair on August 14, 2017 disclosed an elevated level of Betamethasone.
- b. **RE: Valerie Grondin, Complaint Number 2017 MSHRC 45.** Ms. Grondin is alleged to have violated MSHRC Rules Chapter 7 and 11. Ms. Grondin is the trainer of record for the horse "Pembroke Perfect". A blood sample obtained from Pembroke Perfect following the Ninth Race at Scarborough Downs on October 14, 2017 disclosed an elevated level of Betamethasone.

- 4. **Review of the Biennial Budget.** Pursuant to 8 MRS Section 267 the Commission will conduct a hearing to make findings regarding and develop recommendations for its operating budget for the biennium. Betty Farr handed out the Biennial Budget Sheet for years 2020-2021. Henry Jennings explained the sheet. Commissioner Timmons asked if there were any questions regarding the biennial

budget as presented. Commissioner McFarland asked Mr. Jennings if the commission is testing two horses for each race. Mr. Jennings stated yes. Mr. McFarland made a motion to approve the biennial budget as presented by the executive director. Commissioner Graham seconded. Vote 5-0.

5. **Determination of the Base Purse for Maine's 2018 Sire Stakes Program.** Commission rule, Chapter 9, Section 5, requires the Commission to determine the base purse for both the two year olds and the three year olds no less than thirty days prior to the first scheduled stake race. The Maine Standardbred Breeders and Owner's Association has consulted with the Department staff and will propose a base purse for the program. Diann Perkins and Wendy Ireland were present and represented the Maine Standardbred Breeders and Owner's Association. Mr. Jennings met with the breeders and staff to come up with a recommendation for the base purse. He stated that there is a 30-day requirement to set the base purse. They are recommending the base purse to be set at \$9,150. Commissioner Timmons asked if there were any questions. Commissioner McFarland asked Ms. Perkins what would be a better date. Ms. Perkins stated that it would be a good idea to change the date. She also stated that Skowhegan would be changing their lanes to 7. Michael Sweeney asked what was in the promotional account. Mr. Jennings stated that the MSBOA carried over \$80,000 for the promotion money. Mr. Sweeney stated that it was not to carry over but to promote the product. Mr. Jennings stated yes. Mr. Sweeney thanked the MSBOA for their help. Commissioner Graham made a motion to set the base purse at \$9,150 with the 3 year old finals at \$65 and 2 year old finals at \$40, and revisit in June if things change. He also stated to change the 30-day rule to 15 days. Commissioner McFarland seconded. Vote 5-0. Mr. Jennings stated that the rule specifies the base purse and relates to the legs. Usually, they would adjust the base purse and not bring back the amount. Commissioner Graham stated to change the finals and come up with something so that there is no carry over. Commissioner McFarland made a motion to remove the requirement for the 2 and 3 year old finals of \$40 and \$65 as previously stated. Commissioner Graham seconded. Vote 5-0.
6. **Discussion of Additional Rulemaking.** The Maine Standardbred Breeders and Owners Association has submitted a minor rule amendment proposal for Chapter 9. In addition, the Department has a handful of other minor amendments for consideration. Mr. Jennings stated that he has received a comment to change the purse structure in the Sire Stakes Program for the remaining horses to receive 1 percent of the purse. He also stated that the trainer of every horse participating in the program to state where the horse is located for the finals and if moved from that location to contact the commission. Mr. Jennings stated that he met with the race secretaries and discussed how to rethink what the sport is. Mr. Sweeney stated that if a horse does not fit the condition/class the horse would draw to the outside. He also explained about how the quarrion rule was done in the past. AAG, Guay stated that the rule says that only the first 5 places receive purse money. Commissioner McFarland and the MSBOA agreed that 1 percent of the total purse be distributed to the 6th, 7th, and 8th place winners.
7. **Other Business:**
 - a. Continued discussion regarding the Commission's Consent Agreement Policy
This item was continued.
8. **Schedule of Future Meetings:**
No meeting scheduled.
9. **Adjourn**
6:40 p.m.